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In The

Supreme Court of the United States

October Term, 1995

JERSEY CARTING, INC., ANGELA MORIANO AND MARIO MORIANO,

Petitioners,

v.

BOARD OF REGULATORY COMMISSIONERS,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

DEBORAH T. PORITZ
Attorney General of New Jersey
Attorney for Respondent
Board of Regulatory
Commissioners of New Jersey
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel: (201) 648-4846

ANDREA M. SILKOWITZ
Assistant Attorney General
Of Counsel

D'ANDRE WORKMAN
Deputy Attorney General
Counsel of Record and on the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Petitioners are asking this Court to review an intermediate state court appellate decision which: (1) affirmed an administrative decision to deny petitioners a stay of an administrative proceeding pending the outcome of a separate and independent criminal proceeding against petitioners; and (2) rejected petitioners' Commerce Clause challenge to the State of New Jersey's solid waste regulatory system on the grounds that petitioners failed to raise this issue below at the administrative hearing.

The counter-statement of questions presented is as follows:

1. Whether an intermediate state court appellate decision affirming the denial of a stay of an administrative proceeding pending the outcome of a criminal proceeding presents a question of public importance?

2. Whether an intermediate state court appellate decision affirming the imposition of sanctions and penalties against petitioners for violating New Jersey's solid waste regulatory laws rests on adequate non-federal grounds?

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COUNTER-STATEMENT OF THE CASE

Since this Court's decision in *City of Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978), the State of New Jersey ("State") has continued to grapple with its solid waste crisis. Petitioners' business practices in violation of New Jersey's regulatory system have contributed to this crisis. Based upon findings of an independent administrative law judge ("ALJ") following a seven-day plenary hearing, the State of New Jersey has determined that petitioners are not qualified to be licensed in the State's solid waste industry.

This case arose out of the State of New Jersey's enforcement action against Jersey Carting, Inc., a New Jersey licensed solid waste hauler, and its owners, Angela and Mario Moriano, (collectively "petitioners") as a result of petitioners' illegal and deliberate disregard of New Jersey's solid waste utility regulatory laws. Following a thorough investigation, the Board of Public Utilities ("Board") charged petitioners with unlawfully disposing of 102 truckload containers of solid waste at unauthorized New Jersey sites in violation of waste flow orders and committing 84 tariff violations. (Pet. App. 70a) The matters were transferred to the New Jersey Office of Administrative Law for a full evidentiary hearing.

Exactly one week before the evidentiary hearing was to commence, petitioners filed a motion arguing that the Fifth Amendment Double Jeopardy Clause of the United States Constitution warranted a dismissal of the administrative hearing or, alternatively, a stay of the administrative hearing pending the outcome of a criminal proceeding which charged petitioners with theft by

deception. Issued more than one and one-half years after the Board's case, the theft by deception indictment charged petitioners with unlawfully obtaining money from two garbage customers by creating and reinforcing the false impression that their customers' garbage was being disposed of at authorized disposal facilities. (Pet. App. 74a) Contrary to petitioners' assertion, the criminal indictment and the Board's case did not involve "identical issues of fact" (Pet. 4) nor were the criminal and administrative proceedings "interrelated." (Pet. 7) First, the criminal charge was far narrower in scope than the Board's charges of petitioners' widespread violations of the State of New Jersey solid waste regulatory laws. Secondly, while the administrative proceeding sought monetary penalties, more importantly, the Board sought to delicense and debar petitioners from the solid waste industry because of their pattern and practice of violating the State's solid waste laws. (Pet. App. 74a-75a)

A plenary hearing was held over the course of seven days. On the first day of hearing, the ALJ denied petitioners' motion to dismiss and alternatively their request for a stay of the administrative proceeding, rejecting petitioners' double jeopardy arguments.[1] The Board then called eight witnesses; two of those witnesses were petitioners Angela and Mario Moriano. When called to the witness stand, Angela and Mario Moriano, on the advice of their counsel, exercised their Fifth Amendment rights refusing to respond to any of the Board's questions. Petitioners cross-examined the Board's other witnesses but

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[1] Petitioners did not seek interlocutory review of the ALJ's denial of a stay.

did not call any witnesses on their own behalf. (Pet. App. 72a)

Following the administrative hearing, the ALJ issued her decision, finding that petitioners had flagrantly violated the Board's waste flow orders and certain Board customer billing orders in violation of the New Jersey Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-1 *et seq.*, and the New Jersey Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* Because of the seriousness of the violations and the egregiousness of petitioners' illegal conduct, the ALJ recommended the revocation of Jersey Carting's license to engage in the solid waste industry and the permanent debarment of Angela and Mario Moriano from the solid waste industry. The Commissioner of the Department of Environmental Protection (which superseded the Board's jurisdiction) affirmed and modified the ALJ's recommendation to include the finding that petitioners had also committed tariff violations.[2] (Pet. App. 73a and 87a)

On appeal to the Superior Court of New Jersey, Appellate Division ("Appellate Division"), petitioners raised, among other issues, the two questions now presented before this Court: (1) whether the ALJ abused her discretion in denying petitioners' request for a stay of the administrative proceeding pending the outcome of the criminal proceeding; and (2) whether the State of New Jersey's solid waste regulatory system was violative of

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[2] The Commissioner of the Department of Environmental Protection granted petitioners' motion to stay enforcement of the agency's final order while the matter was pending in the Appellate Division.

the Commerce Clause of the United States Constitution. The Appellate Division addressed both these issues.

In rejecting the first contention, the Appellate Division relied upon well-established principles set forth in the New Jersey Supreme Court decision in *State v. Kobrin, Inc.*, 111 *N.J.* 307, 544 *A.*2d 833 (1988) and this Court's decision in *United States v. Kordel*, 397 *U.S.* 1 (1970). (Pet. App. 73a-75a) First, recognizing that petitioners had "concede[d] that the underlying administrative proceeding was broader than the concurrent criminal action," (Pet. App. 74a), the Appellate Division ruled that petitioners had failed to carry their burden of demonstrating how their rights outweighed the public interest. (Pet. App. 73a) Relying upon *Kobrin*, the Appellate Division reasoned that the State of New Jersey's public interest in preventing illegal dumping substantially outweighed petitioners' interest in staying the administrative proceeding. Moreover, the Appellate Division found that because "the public interest in enforcing a comprehensive effort to deal with New Jersey's solid waste disposal crisis was strong and substantial and the scope of the criminal case limited in comparison to the civil proceeding, . . . it was not fundamentally unfair to require [petitioners] to participate in the administrative proceedings." (Pet. App. 75a)

The Appellate Division also rejected the Commerce Clause challenge to New Jersey's solid waste regulatory system on the ground that "this constitutional issue was not raised below." (Pet. App. 83a) Relying upon State law and well-established rules of appellate practice, which require the presentation of any and all legal challenges at the hearing, the Appellate Division ruled that petitioners'

failure to raise the constitutionality of New Jersey's waste management system at any stage of the administrative proceeding was a fatal defect. (Pet. App. 82a-83a) The Appellate Division further opined that even if petitioners had properly raised the issue, it would have concluded that petitioners' argument was without merit. (Pet. App. 84a-86a)

Finally, the Appellate Division affirmed the ALJ and Commissioner's decisions ordering the revocation of Jersey Carting's solid waste license, the debarment of petitioners Angela and Mario Moriano from the solid waste industry, and the payment of a $186,000 fine. The Appellate Court found that the Board had conducted a "thorough and extensive investigation of [petitioners'] actual waste disposal reveal[ing] widespread and continued disregard of [waste flow] orders" and that petitioners' illegal conduct was "intentional" and "contumacious" and a "very serious violation of New Jersey's solid waste management system." (Pet. App. 72a and 87a)

On November 14, 1995, the New Jersey Supreme Court denied petitioners' petition for certification which raised, among other issues, the same two issues now presented to this Court.

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO DEMONSTRATE THAT THE DENIAL OF A STAY OF AN ADMINISTRATIVE PROCEEDING PENDING THE OUTCOME OF A CRIMINAL PROCEEDING PRESENTS A QUESTION OF PUBLIC IMPORTANCE OR WHETHER THE DECISION TO DO SO IS IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Petitioners principally claim that this Court should grant the writ of certiorari because the "analysis [of the Appellate Division decision] was incorrect and [that] a stay of the civil proceeding should have been granted pending the resolution of the criminal matter." (Pet. 12) This amorphous argument does not raise a question of public importance nor does it require this Court to resolve any unsettled or conflicting decisions of this Court or any other court. The Petition should therefore be denied.

Contrary to petitioners' claim, the decision of the Appellate Division affirming the denial of a stay rests on well-established New Jersey state law as well as federal case law which is wholly consistent with the protections guaranteed by the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right to due process of law. In the decision below, the Appellate Division upheld the denial of the stay by relying upon the New Jersey Supreme Court's decision in *Kobrin, supra,* 111 *N.J.* 307, 544 *A.*2d 833. *Kobrin* establishes the criteria for determining whether to grant a stay when there are concurrent civil and criminal charges pending against an individual. Under *Kobrin*'s analysis, a trial or

an administrative judge must determine: (1) whether in the civil proceeding the government seeks only a monetary penalty against the defendant; (2) whether the two actions are nearly identical in scope; (3) whether the relief sought in the civil proceeding is intended to prevent continued injury to the public; and (4) whether continuation of the civil proceeding would expose a litigant to undue risk of losing the civil case or facing criminal prosecution. *Id.* at 313-15, 544 *A.*2d at 836-837.

The *Kobrin* standard for determining whether to grant a stay of a civil proceeding pending the outcome of a criminal proceeding is wholly consistent with a general body of federal case law. In fact, the principles articulated by the New Jersey Supreme Court in *Kobrin* are identical with those established by decisions of this Court and other federal courts. *See Kobrin, supra,* 111 *N.J.* at 312-317, 544 *A.*2d at 836-838 (citing among other federal cases *United States v. Kordel,* 397 *U.S.* 1 (1970) and *Sec. and Exch. Comm'n v. Dresser Indus.,* 628 *F.*2d 1368 (D.C. Cir. 1980) (*en banc*), *cert. denied,* 449 *U.S.* 993 (1980)). These principles as articulated by the New Jersey Supreme Court and by this Court serve to protect the fundamental constitutional guarantees of due process and the proper administration of justice. *Kordel, supra,* 397 *U.S.* at 11.

In *Kobrin,* the New Jersey Supreme Court, consistent with *Kordel,* recognized as a general matter that the government is free to pursue both civil and criminal remedies without infringing on the constitutional rights of defendants. *Kobrin,* 111 *N.J.* at 312-313, 544 *A.*2d at 835-836. Relying on this Court's guidance, the New Jersey Supreme Court explained:

> The conflict of interest resulting from the interrelationship of criminal and civil actions against the same defendant is a familiar one. In *DeVita v. Sills*, 422 *F.*2d 1172 (3d Cir. 1970), [the Third Circuit] explored the tensions inherent in such proceedings and noted that whatever the difficulties of invoking the fifth-amendment privilege, *there is no constitutional inhibition that a defendant in a criminal case not "be put to the difficult choice of having to assert the privilege in a related case * * * ." Id.* at 1178 (citing *United States v. Kordel*, 397 *U.S.* 1, 90 *S.Ct.* 763, 25 *L.Ed.*2d 1 (1970)).
>
> [*Kobrin*, 111 *N.J.* at 312-313, 544 *A.*2d at 835-836 (emphasis added)]

The focus of the *Kobrin* analysis is whether a denial of a stay "would impose undue hardship on a defendant and would thereby expose . . . the defendant exercising the constitutional privilege" to unnecessary adverse consequences. *Kobrin*, 111 *N.J.* at 314, 544 *A.*2d at 836.

The analysis underlying the New Jersey Supreme Court decision in *Kobrin* rests principally upon *Kordel* and its progeny. In *Kordel*, this Court found no constitutional infringement in allowing discovery to proceed in a civil action involving violations of the federal Food, Drug, and Cosmetic Act, despite the pendency of a criminal investigation involving the same conduct. This Court stressed that the public interest in protecting consumers from mislabeled drugs required prompt civil action by the agency charged with enforcing the food and drug laws, and that such action should not await the resolution of pending criminal proceedings. This Court reasoned: "It would stultify enforcement of federal law to require a

government agency . . . to choose either to forego recommendation of criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11. "[W]e cannot agree that the respondents have made out either a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power." *Id.*

Just as this Court emphasized in *Kordel*, the New Jersey Supreme Court in *Kobrin* recognized that "there is no constitutional inhibition that a defendant in a criminal case not 'be put to the difficult choice of having to assert the privilege in a related civil case.' " *Kobrin*, 111 *N.J.* at 312-313, 544 *A.*2d at 835-836 (citing *United States v. Kordel, supra*, 397 *U.S.* 1). Moreover, consistent with this Court's ruling in *Kordel*, the New Jersey Supreme Court equally stressed that "when relief is sought to prevent continued injury to the public . . . , the civil proceedings should not be stayed except in the most unusual circumstances." *Kobrin*, 111 *N.J.* at 314, 544 *A.*2d at 837 (citing *United States v. Kordel, supra*, 397 *U.S.* 1). Most importantly, both *Kordel* and *Kobrin* clearly state: "If the defendants are unqualified to serve in [their] profession . . . the licensure proceedings against them cannot be stayed." *Id.* at 315, 544 *A.*2d at 837; *accord Kordel*, 397 *U.S.* at 11.

Contrary to petitioner's claim, the New Jersey Supreme Court decision in *Kobrin* is consistent with *Kordel* but also the decision by the Court of Appeals for the District of Columbia in *Securities & Exch. Comm'n v. Dresser Indus., supra*, 628 F.2d 1368. In *Dresser*, the District of Columbia Court of Appeals, like the New Jersey

Supreme Court in *Kobrin*, relied on this Court's decision in *Kordel* in articulating factors which would guide the Circuit Court's consideration for determining whether to stay a civil proceeding pending the outcome of a parallel criminal proceeding:

> The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *See Baxter v. Palmigiano*, 425 *U.S.* 308, 98 *S.Ct.* 1551, 47 *L.Ed.*2d 810 (1976); *DeVita v. Sills*, 422 *F.*2d 1172, 1181 (3d Cir. 1970). Nevertheless, a court may decide in its discretion to stay civil proceedings . . . "when the interests of justice seem[] to require such action. . . . " *United States v. Kordel, supra*, 397 *U.S.* at 12 n.27, 90 *S.Ct.* at 770. . . . The court must make such determinations in the light of the particular circumstances of the case.
>
> Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.
>
> [*Dresser*, 628 *F.*2d at 1376-77 (citations omitted)]

There simply is no fundamental difference between the analysis set forth in *Dresser* and that in *Kobrin*. In fact, *Kobrin* places significant reliance upon *Dresser* in its analysis of whether to stay a civil proceeding pending the outcome of a parallel criminal proceeding. *See Kobrin*, 111 *N.J.* at 314-317, 544 *A.*2d at 836-837 (whether the civil proceeding seeks only a monetary recovery, citing *Dresser*, 628 *F.*2d at 1375); (whether the two actions are

identical in scope, citing *Dresser*, 628 F.2d at 1376); (whether deferring the criminal action outweighs the public interest, citing *Dresser*, 628 F.2d at 316-317).

Moreover, since this Court's announcement in *Kordel* more than twenty-five years ago, a myriad of federal courts have articulated similar standards for determining whether to stay civil proceedings pending the outcome of parallel criminal proceedings. *See, e.g., SEC v. First Financial Group of Texas*, 659 F.2d 660, 666 (5th Cir. 1981) ("The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions."); *DeVita v. Sills, supra*, 422 F.2d 1172 (the 3d Cir., quoting *Kordel*, ruled that there is no constitutional inhibition that a defendant in a criminal case not "be put to the difficult choice of having to assert the privilege in a related civil case"); *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970) ("fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter"); *Paine, Weber, Jackson & Curtis, Inc. v. Andrus, Inc.*, 486 *F. Supp.* 1118, 1119 (S.D.N.Y. 1980) ("That defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff from expeditiously advancing its claim.").

Thus, an examination of federal case law, including this Court's decision in *Kordel*, reveals that the New Jersey Supreme Court's decision in *Kobrin* promotes the fundamental protections guaranteed by the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right of due process of law. In the

decision below, the Appellate Division carefully and thoroughly weighed the inherent conflict of interests resulting from petitioners' assertion of their Fifth Amendment right against self-incrimination and the State of New Jersey's substantial and strong interest in the proper disposal of solid waste in the context of New Jersey's solid waste crisis. (Pet. App. 73a-75a) Thus, petitioners do not now present any question of public importance nor do they demonstrate that the decision below is in conflict with any decision of this Court, or any other federal or state court.

Petitioners also have failed to demonstrate that the state appellate court's "analysis was incorrect." (Pet. 12) In fact, petitioners fail to cite to anything beyond their blanket assertion that under a proper analysis "a stay of the civil proceeding should have been granted pending the resolution of the criminal matter." (Pet. 12) The Appellate Division, consistent with the teachings of *Kobrin*, ruled that petitioners "had the burden to demonstrate how their rights outweighed the public interest." (Pet. App. 75a) Petitioners failed to do so. As the Appellate Division emphasized:

> The public interest in enforcing a comprehensive effort to deal with [the solid waste] crisis is strong and is weakened by illegal dumping which destabilizes the economy and creates a health hazard. Since the public interest in preventing illegal dumping was substantial and the scope of the criminal case limited in comparison to the civil proceeding, . . . it was not fundamentally unfair to require appellants to participate in the administrative proceedings.
>
> [Pet. App. 75a (citations omitted)]

II. THE STATE APPELLATE DECISION REJECTING PETITIONERS' COMMERCE CLAUSE CHALLENGE TO NEW JERSEY'S WASTE MANAGEMENT SYSTEM RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND THEREFORE DOES NOT PRESENT A QUESTION OF PUBLIC IMPORTANCE OR SIGNAL A CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Petitioners also claim that the Appellate Division improperly dismissed their constitutional challenge to the State of New Jersey's solid waste regulatory laws. (Pet. 13-14) In raising this claim, however, petitioners again fail to address whether this particular issue raises a question of public importance or whether the issue signals a conflict between any decision by this Court or any other federal or state court. Significantly, petitioners fail to mention that the Appellate Division dismissed petitioners' claim on non-federal grounds; thus, that court ruled:

> [T]his constitutional issue was not raised below. This defect is fatal to appellants' argument. *See Deerfield Estates, Inc. v. East Brunswick Tp. N.J.*, 115, 120 (1972) ("the general rule of appellate practice, that ordinarily no issue will be considered by the reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance"); *accord State v. Interest of A.J.*, 232 *N.J. Super.* 274, 293 (App. Div. 1989). It is well-settled that "Courts should not reach constitutional questions unless necessary to the disposition of the

litigation." *O'Keefe v. Passaic Valley Water Comm'n*, 132 *N.J.* 234, 240 (1993).

[Pet. App. 83a]

This Court provided the standard for determining whether a state court opinion rests on adequate and independent state grounds in *Michigan v. Long*, 463 *U.S.* 1032 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041. Because the state court decision at issue here expressly rests on independent and adequate state grounds, this Court should reject petitioners' argument that the state court improperly failed to consider petitioners' constitutional challenge to New Jersey's waste management system.

Although the Appellate Division dismissed petitioners' Commerce Clause argument on adequate and independent state grounds, petitioners claim that the Appellate Division "erred in failing to consider Petitioners' challenges to the New Jersey waste flow control scheme as being violative of the Commerce Clause." (Pet. 15) Petitioners' argument is predicated on this Court's decision in *C. & A Carbone v. Town of Clarkstown*, ___ *U.S.* ___, 114 *S.Ct.* 1677 (1994), in which the Court found unconstitutional a New York municipal waste flow ordinance that directed the flow and disposal of a municipality's solid waste. The Court invalidated the local ordinance on the ground that the ordinance unreasonably interfered with interstate commerce. *Carbone, supra*, ___ *U.S.* at ___, 114 *S.Ct.* at 1683-84. Petitioners' argument, however, should be summarily rejected because it

assumes that *Carbone*, in declaring a municipal ordinance unconstitutional, also impliedly and correspondingly declared New Jersey's state-wide waste management system unconstitutional. Apart from the fact that this issue is still being litigated, *see Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701 (3d Cir. 1995), *remanded*, 893 *F. Supp.* 301 (D.C.N.J. 1995), that was not *Carbone's* mandate. "The Commerce Clause was intended as a shield against discrimination, not as a sword to obtain a preference." *Borough of Glassboro v. Gloucester County Board Of Chosen Freeholders*, 100 *N.J.* 134, 147, 495 *A.*2d 49, 56, *cert. denied*, 474 *U.S.* 1008 (1985). In *Carbone*, this Court invalidated a single New York municipal waste flow ordinance and did so with the benefit of a full record to decide that matter, explaining that:

> Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, *save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny*, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 *U.S.* 1 (1986).
>
> [*Carbone, supra*, ___ *U.S.* at ___, 114 *S.Ct.* at 1683 (emphasis added).]

Petitioners' failure to raise this issue in a timely fashion below precluded development of the type of record this Court requires for review of Commerce Clause issues. "Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation." *Gospel Army v. City of Los Angeles*, 331 *U.S.* 543, 548 (1947). Thus, the appellate court was not in a position to

apply *Carbone* to the State of New Jersey's entire regulatory system. As this Court has noted, "It is settled beyond controversy that a decision of this Court on appeal, as [to] a matter of fact, does not become the law of the case." *Gospel Army, supra,* 331 *U.S.* at 548 (internal quotation omitted).

Moreover, at the time that the Appellate Division rendered its decision, there had been no ruling by any state or federal court that New Jersey's solid waste management system was in any way unconstitutional. Indeed, as of the date of the Appellate Division's ruling, the controlling case in the Third Circuit specifically upheld the constitutionality of New Jersey's solid waste management system under Commerce Clause analysis. *J. Filiberto Sanitation v. Dep't of Environmental Protection,* 857 *F.*2d 913 (3d Cir. 1988). Besides *Filiberto,* other New Jersey cases have upheld the constitutionality of New Jersey's waste management system. *See In re Fiorillo Bros.,* 242 *N.J. Super.* 667, 577 *A.*2d 1316, (App. Div.), *certif. denied,* 122 *N.J.* 363, 585 *A.*2d 371 (1990); *In re Waste Disposal Agreement,* 237 *N.J. Super.* 516, 568 *A.*2d 547 (App. Div.), *certif. denied,* 121 *N.J.* 647, 583 *A.*2d 337 (1990).

Only in the wake of *Carbone* has the constitutionality of New Jersey's waste flow regulations been put into question. Although overruling *Filiberto* in *Atlantic Coast,* the Third Circuit did not find New Jersey's waste flow regulations unconstitutional. *Atlantic Coast, supra,* 48 *F.*3d at 718-719. Instead, in considering this Court's decision in *Carbone,* the Third Circuit remanded the case to the district court for a fact-finding determination of whether New Jersey waste flow could meet the heightened scrutiny required by *Carbone. Atlantic Coast, supra,* 48 *F.*3d

701. The pending litigation in *Atlantic Coast* attests to the fact that the Appellate Division was not in a position to apply *Carbone* to New Jersey's regulatory system at the time the Appellate Division had rendered its decision. Thus, as *Atlantic Coast* demonstrates, this Court's decision in *Carbone* did not change the basic analytical framework within which the lower courts are to review laws that allegedly violate the Commerce Clause; needless to say, this analytical framework depends heavily on an analysis of the specific purposes and effects of each law. *See also West Lynn Creamery, Inc. v. Healy*, ___ *U.S.* ___, ___, 114 *S.Ct.* 2205, 2215 (1994) (Commerce Clause analysis guided by "sensitive, case-by-case analysis of purposes and effects" of challenged legislation).

Given that the state appellate court did not have a record before it to decide such a fact-sensitive question, it would not have been appropriate nor prudent for the Appellate Division to simply read *Carbone* as automatically mandating the invalidation of the comprehensive solid waste utility management system in New Jersey based on the mere commonality of the words "waste flow." Yet, that is what petitioners desire. Petitioners argue, "In *Carbone*, this Court held a similar waste flow control ordinance was discriminatory against interstate commerce." (Pet. 14) However, in making this argument, petitioners erroneously describe New Jersey's state-wide solid management system as "a similar waste flow control ordinance" to a single New York waste flow ordinance. Nothing could be more misleading than this assertion. As previously noted, the complexity of New Jersey's system of waste management is well-documented and is currently under review. *See, e.g., Atlantic Coast,*

supra, 48 F.3d at 704-708 ("New Jersey has an extensive statutory and regulatory system governing the management and disposal of solid waste.") Second, petitioners' argument is based on a speculative theory that *Carbone* sounded the death knell to New Jersey's waste management system. That was not the case when this Court rendered its decision in *Carbone*, and it certainly was not the case when the state appellate court rejected petitioners' argument.

III. THE STATE COURT AFFIRMANCE OF THE PENALTIES AND SANCTIONS IMPOSED UPON PETITIONERS CONCERNS A DISPUTE BETWEEN THE STATE OF NEW JERSEY AND PETITIONERS AND THEREFORE DOES NOT PRESENT ANY QUESTION OF PUBLIC IMPORTANCE OR GIVE RISE TO ANY CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT.

Finally, petitioners claim that the State court "erred in declaring that *even if* the New Jersey waste flow scheme is found to be *per se* invalid," the penalties and sanctions imposed upon petitioners would remain enforceable. (Pet. 15) (emphasis added) This final argument should be dismissed by this Court because, regardless of whether there is any merit to the argument, it is not ripe for review. Under the Court's ripeness doctrine, it has been well-settled that in accordance with the Court's policy of self-restraint, this Court will not decide cases "in advance of the necessity of deciding them." *Rescue Army v. Municipal Court of Los Angeles*, 333 *U.S.* 549, 568-569 (1947). On its face, the premise of petitioners'

argument -- "even if the New Jersey waste flow system is found to be per se invalid" -- is highly speculative and does not present any case or controversy ripe for review.

Petitioners' argument is a challenge to nothing more than dictum in the State Court decision. The appellate court simply observed that "[i]f, in an appropriate setting, *Carbone* was determined to negate New Jersey's waste disposal program," *Carbone* would not impact petitioners' sanctions and penalties. (Pet. App. 84a-85a) In making this observation, the Appellate Division, quoting this Court's decision in *Walker v. Alabama*, 388 *U.S.* 307, *reh'g denied*, 389 *U.S.* 894 (1967), ruled that "an unconstitutional statute . . . may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially *declared in appropriate proceedings.*" *Id.* at 320-321 (emphasis added);[3] *see also In re Felmeister*, 95 *N.J.* 431, 471 *A.*2d 775 (1984) (quoting *Walker* for same proposition). Thus, the Appellate Division observed that regardless of *Carbone*, the sanctions and penalties imposed upon petitioners would remain enforceable. Similarly, petitioners in the case before this Court cannot be the judge of their own case in spite of New Jersey's

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[3] In *Walker v. Alabama*, petitioners Dr. Martin Luther King, Jr., and the Rev. Wyatt Tee Walker, among other ministers, were jailed for violating a constitutionally suspect parade ordinance and injunction as a result of a protest march they led against the strict laws of segregation in the State of Alabama. This Court ruled: "[T]he rule of law that Alabama followed . . . reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion." *Walker v. Alabama, supra*, 388 *U.S.* at 320-321.

solid waste crisis and in spite of petitioners' flagrant violations of the law governing that crisis. As ruled in *Walker v. Alabama, supra*, "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law." *Id.* at 321. Petitioners "with knowledge of the waste flow orders, deliberately ignored those orders and new rate increases." (Pet. App. 87a) As the Appellate Division concluded, petitioners "cannot shield themselves from liability for their deliberately contumacious acts by raising the defense that the flow control orders at issue are unconstitutional under *Carbone*." (Pet. App. 87a) Neither should petitioners now be allowed an opportunity to inappropriately forge the Commerce Clause, nor this Court's decision in *Carbone*, as a sword to obtain an unwarranted preference.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons, their Petition for a Writ of Certiorari should be denied.

Dated this 15th day of March, 1996

Respectfully submitted,

DEBORAH T. PORITZ
Attorney General of the State
of New Jersey
Attorney for Respondent, Board of Regulatory Commissioners of State of New Jersey
124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel.: (201) 648-4846

By: D'ANDRE WORKMAN
Deputy Attorney General

ANDREA M. SILKOWITZ
Assistant Attorney General
Of Counsel

D'ANDRE WORKMAN
Deputy Attorney General
Counsel of Record and On the Brief